

REMARKS

The Office Action dated October 5, 2006, has been received and carefully noted. The above amendments to the claims, and the following remarks, are submitted as a full and complete response thereto.

Claims 1-38 are currently pending in the application, of which claims 1, 22, 32, 33, 36, and 38 are independent claims. Claims 10, 13, 22, 23, and 30-33 have been amended, and claim 38 has been added, to more particularly point out and distinctly claim the invention. No new matter has been added, and no new issues have been raised that would require further consideration and/or search, or would otherwise prevent entry of the amendment. Entry of the amendments is respectfully requested, because the amendments place the application in better condition for allowance and/or appeal.

Introduction

All of the claims were again rejected for essentially the same reasons as in the previous Office Actions, and Applicant respectfully traverses each of the respective rejections. The Office Action continues to make the same mistakes that the previous Office Actions in the prosecution of this application have made. Part of the reason for this continuity of error is that each of the Office Actions does not contain any meaningful response to the arguments previously presented. In essence, the current Office Action is essentially a duplicate of the Office Action mailed April 19, 2006.

The Examiner has a duty to respond to the substance of arguments presented, when the rejection is maintained, and Applicant respectfully requests that the finality of the Office Action be withdrawn based on the Examiner's failure to respond to the arguments presented.

MPEP 707.07(f) sets forth the Examiner's obligation to answer all material traversed. Specifically MPEP 707.07(f) states that "the examiner should, if he or she repeats the rejection, take note of the applicant's argument and answer the substance of it." It is essential that the Office Action address each of the arguments presented by Applicant, so that meaningful appellate review is possible. The Office Action, however, does not substantively address Applicant's arguments. Accordingly, if the rejection is again maintained, a response to the arguments is respectfully requested in a new Non-Final Office Action.

Furthermore, in rejecting claims under 35 U.S.C. § 103, the USPTO bears the initial burden of presenting a *prima facie* case of obviousness. *See In re Rijckaert*, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993). A *prima facie* case of obviousness is established by presenting evidence that the reference teachings would appear to be sufficient for one of ordinary skill in the relevant art having the references before him to make the proposed combination or other modification. *See In re Lintner*, 458 F.2d 1013, 1016, 173 USPQ 560, 562 (CCPA 1972). Furthermore, the conclusion that the claimed subject matter is *prima facie* obvious must be supported by evidence, as shown by some objective teaching in the prior art or by knowledge generally available to one of ordinary

skill in the art that would have led that individual to combine the relevant teachings of the references to arrive at the claimed invention. *See In re Fine*, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). Rejections based on 35 USC § 103 must rest on a factual basis with these facts being interpreted without hindsight reconstruction of the invention from the prior art. The USPTO may not, because of doubt that the invention is patentable, resort to speculation, unfounded assumption or hindsight reconstruction to supply deficiencies in the factual basis for the rejection. *See In re Warner*, 379 F.2d 1011, 1017, 154 USPQ 173, 178 (CCPA 1967).

Indeed, the Federal Circuit has repeatedly cautioned against employing hindsight by using Applicant's disclosure as a blueprint to reconstruct the claimed invention from the isolated teachings of the prior art. *See, e.g., Grain Processing Corp. v. American Maize-Prods. Co.*, 840 F.2d 902, 907, 5 USPQ2d 1788, 1792 (Fed. Cir. 1988). When determining obviousness, "the [E]xaminer can satisfy the burden of showing obviousness of the combination 'only by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references.'" *In re Lee*, 277 F.3d 1338, 1343, 61 USPQ2d 1430, 1434 (Fed. Cir. 2002), citing *In re Fritch*, 972 F.2d 1260, 1265, 23 USPQ2d 1780, 1783 (Fed. Cir. 1992).

Furthermore, "Broad conclusory statements regarding the teaching of multiple references, standing alone, are not 'evidence.'" *In re Dembiczak*, 175 F.3d 994, 999, 50 USPQ2d 1614, 1617 (Fed. Cir. 1999). Likewise, "Mere denials and conclusory

statements ... are not sufficient to establish a genuine issue of material fact.” *Dembiczak*, 175 F.3d at 999-1000, 50 USPQ2d at 1617, *citing McElmurry v. Arkansas Power & Light Co.*, 995 F.2d 1576, 1578, 27 USPQ2d 1129, 1131 (Fed. Cir. 1993).

As discussed in detail below, the Office Action sought to combine various references in order to provide all of the claim elements. However, the Office Action did not include any objective evidence of teaching, motivation, or suggestion to combine the references. Accordingly, the rejections constitute impermissible hindsight reconstruction.

To protect against such invalid and inappropriate hindsight reconstruction, the Federal Circuit has ruled that references cannot be selected, and selected elements from selected references cannot be combined, without some suggestion, motivation, or teaching that would render obvious that selection and that combination. See, e.g., *Karsten Mfg. Corp. v. Cleveland Golf Co.*, 242 F.3d 1376, 1385, 58 USPQ2d 1286, 1293 (Fed. Cir. 2001) (“In holding an invention obvious in view of a combination of references, there must be some suggestion, motivation, or teaching in the prior art that would have led a person of ordinary skill in the art to select the references and combine them in the way that would produce the claimed invention.”); and *Brown & Williamson Tobacco Corp. v. Philip Morris Inc.*, 229 F.3d 1120, 1124-25 (Fed. Cir. 2000) (“a showing of a suggestion, teaching, or motivation to combine the prior art references is an ‘essential component of an obviousness holding’”). Because the combination of references is improper in each case, as detailed below, it is respectfully requested that each of the rejections below be withdrawn.

Rejections under 35 U.S.C. 103(a)

Claims 1-3, 15-18, and 34 were again rejected under 35 U.S.C. 103(a) as unpatentable over U.S. Patent No. 6,496,476 of Badt et al. (“Badt”) in view of U.S. Patent No. 5,953,312 of Crawley et al. (“Crawley”). The Office Action took the position, in essence, that Badt teaches all of the elements of the claims except “determining whether a node of at least one alternate node has available capacity to allow information from the failed link to be rerouted,” as recited in independent claim 1. The Office Action supplied Crawley to remedy this deficiency of Badt, although the Office Action organized the rejection as though Crawley were the primary reference. Applicant respectfully traverses this rejection.

Claim 1, upon which claims 2-21 and 34 depend, is directed to a method including establishing a protection path for a failed link between first and second nodes in a mesh network, wherein a transfer of information from the first node to the second node is disrupted by the failed link. The method also includes establishing an alternate path from the second node to the first node via a destination-to-source communication channel, wherein the destination-to-source communication channel is established through at least one alternate node beginning at the second node and ending at the first node. The method further includes determining whether a node of the at least one alternate node has available capacity to allow information from the failed link to be rerouted. The method additionally includes executing a switch function at the node of the at least one alternate node traversed by the destination-to-source communication channel to allow source-to-

destination information traffic flow from the first node to the second node along the alternate path defined by the destination-to-source communication channel. The method also includes switching the information traffic flow at the first node from the failed link to the alternate path when the destination-to-source communication channel is established at the first node.

It is respectfully submitted that the cited references, Badt and Crawley, whether viewed singly or combined, do not disclose or suggest all of the elements of any of the presently pending claims.

Badt is generally directed to a system and method for restricted reuse of intact portions of failed paths. Badt employs messaging techniques to provide information to both origin and destination nodes of a failed path on which spans or links remain intact leading up to the point of failure. This is accomplished by first detecting the failure by the adjacent custodial nodes bracketing the fault. Each of those custodial nodes adjacent to the failure then initiates the propagation of a “reuse” message to either the origin node or the destination node.

Crawley is generally directed to a method and apparatus for determining alternate routes in a network using a connection-oriented protocol. Rather than performing a complete search or exploration of the network for all possible alternate paths, Crawley performs a limited search for an alternate path from source node to the destination node. The alternate path is selected based on a list of well-interconnected neighboring nodes that are not the ingress node and not an egress node on the normal path. If the attempt

fails, a connection refusal signal is sent back to the source node indicating that the Quality of Service (QoS) is not available to the destination node.

The Office Action asserted that it would have been obvious to “implement the teaching of Crawley in the system of Badt” to yield the system of Badt further including “determining whether a node of at least one alternate node has available capacity to allow information from the failed link to be rerouted,” as recited in independent claim 1. The Office Action’s rationale was that Crawley’s system requires less time and computational resources than “the normal procedure for identifying alternate paths.”

Applicant respectfully submits that the Office Action is mistaken. Crawley does not teach or suggest that the feature, “the receiving node determines whether the next hop node has adequate resources and capabilities for the requested data flow,” contributes to Crawley’s alleged advantage of reduced time and computational resources. In other words, Crawley does not say that such a feature produces the alleged advantages of Crawley. Rather, as noted above, Crawley proposes saving time by first resorting to a node that is outside of the typical path, rather than searching all possible routes.

Indeed, from the viewpoint of one of ordinary skill in the art, the Office Action has provided a rationale for using Crawley by itself – not for combining Badt and Crawley. Applicant respectfully submits that there is no teaching, motivation, or suggestion to combine Badt and Crawley (in the way proposed by the Office Action) because they address the connection problem in significantly different ways, and therefore it does not appear that it would be possible to practice both Badt and Crawley

simultaneously in the same system. For example, as described above, Badt starts by bracketing the fault and working outward, whereas Crawley begins by trying a previously unused path.

The Office Action responded tangentially as to what features Crawley does and does not disclose. This is irrelevant to the argument, presented above, that Crawley does not disclose or suggest that the features the Office Action cited produce the advantages the Office Action ascribed to them. To the contrary, as noted above, it is other features – features that are incompatible with Badt’s system – that are alleged to produce the advantages. Thus, one of ordinary skill in the art would not be motivated to take some random, apparently non-advantageous and incompatible feature of Crawley and combine with Badt without the benefit of the present application. Such a combination is improper, unmotivated, hindsight reconstruction.

Applicant respectfully submits that the failure of the Office Action to address the lack of motivation to combine the references highlights the weakness of the Office Action’s position with regard to alleged motivation to combine.

Moreover, the Office Action admitted that Crawley does not disclose or suggest “establishing an alternate path from a second node to a first node via a destination-to-source communication channel, wherein the destination-to-source communication channel is established through at least one alternate node beginning at the second node and ending at the first node.” However, the Office Action asserted that this is inherently taught by teaching that “any node in the system that receive [sic] the connection request

signal can be performed [sic] the establishing of an alternate route can be performed [sic] at the destination node (e.g. any node in the network).” Applicant respectfully disagrees with this analysis.

Assuming that Crawley teaches “any node” can perform the establishing (not admitted), such teaching of “any node” clearly cannot anticipate the recitation of a particular node, because the teaching lacks particularity.

Accordingly, for all of the above reasons, Applicant respectfully requests that the rejections of claims 1-3, 15-18, and 34 be withdrawn.

Claims 36 and 37 were again rejected over U.S. Patent No. 6,430,150 of Azuma et al. (“Azuma”) in view of Crawley. The Office Action took the position that Azuma teaches all of the elements of the claims except “determining whether a node of at least one alternate node has capacity to allow information from the failed link to be rerouted,” as recited in independent claim 36. The Office Action supplied Crawley to remedy the deficiencies of Azuma. Applicant respectfully traverses this rejection.

Claim 36, upon which claim 37 depends, is directed to a network node including a port configured to receive information from a destination-to-source communication link, and a control circuit operably connected to the port and configured to a cross-connect section. The cross-connect section is operably connected to the control circuit and configured to direct network traffic flow between a first node and a second node. The control circuit is configured, upon receipt of the information from a destination-to-source communication link, said information identifying that a protection path for a failed link

between the first and the second node is to be established based on available capacity in the protection path, to cause the cross-connect section to execute a switch function to allow source-to-destination information traffic flow along a path defined by the information received from destination-to-source communication channel.

It is respectfully submitted that the cited references, Azuma and Crawley, whether viewed singly or combined, do not disclose or suggest all of the elements of any of the presently pending claims.

Crawley is discussed above. Azuma is generally directed to a method for restoring connection after failure. The method includes, when failure occurs, transmitting information relating to the failure throughout the network. Each node that receives information about the failure determines alternative paths for bypassing the failure using the information relating to the failure as well as physical and logical topology information. Then service is switched to the alternative paths.

The Office Action uses essentially the same rationale to combine Azuma and Crawley as it did to combine Badt and Crawley. Applicant respectfully submits that the Office Action's rationale is equally flawed here. The Office Action did not present any reason to take the cited aspect of Crawley, and plug it into Azuma. The rationale the Office Action presented is a reason to use Crawley's system instead of Azuma's.

The Office Action responded to Applicant's previous arguments by quoting what was previously argued by the Examiner regarding motivation to combine. However, this quotation supports the point of Applicant's arguments for patentability. The alleged

motivation for combining Crawley with Azuma is exactly the same as the alleged motivation for combining Crawley with Badt, except that in one case the word “Azuma” is used and in the other “Badt, Jr.” is used. Indeed, no matter what reference’s name is inserted into the blank filled by “Azuma” or “Badt, Jr.,” what the Office Action has provided is a motivation to use Crawley itself – not motivation to combine Crawley with any other reference. Accordingly, Applicant respectfully requests that this rejection be withdrawn.

Claims 4-14, 19-33, and 35 were again rejected under 35 U.S.C. 103(a) as being unpatentable over Badt in view of Crawley and further in view of Azuma. The Office Action took the position that Badt and Crawley describe all the elements of the claims except “executing a switch function that comprises optically switching the wavelengths of one or more of the optical signals of the failed link onto optical fibers establishing the alternate path.” The Office Action cited Azuma to remedy these deficiencies of Badt and Crawley. Applicant respectfully traverses this rejection.

Claim 22, upon which claims 23-31 depend, is directed to a network protection configuration including an optical fiber network that includes a plurality of optical network nodes each coupled to transmit and receive optical signals carried on distinct wavelengths on optical fibers of the optical fiber network. The optical fiber network further includes a source node attempting to transmit the optical signals via the failed transmission path and a destination node detecting a failed transmission path, and a communication channel established from the destination node to the source node to

transmit a path failure notification, wherein a route established by the destination-to-source communication channel traversing one or more of the optical network nodes defines an alternate transmission path, and wherein the network nodes defining the alternate transmission path are configured to be switched based on available capacity to allow information from the failed transmission path to be rerouted in response to the path failure notification to facilitate source-to-destination transmission of the optical signals from the failed transmission path along the alternate path.

Claim 32 is directed to a network protection configuration including an optical fiber network that includes a plurality of optical network nodes each coupled to transmit and receive optical signals carried on distinct wavelengths on optical fibers of the optical fiber network. Each of the plurality of optical network nodes includes a fiber cross-connect circuit coupled to receive one or more of the optical fibers of the optical fiber network and to switch the optical signals on the optical fibers to particular output ports of the fiber cross-connect to route the optical signals on the optical fibers to targeted optical fibers, an optical cross-connect circuit coupled to receive one or more of the optical signals and to switch the optical signals to particular output ports of the optical cross-connect to route the optical signals to targeted ones of the optical fibers, and a destination-to-source communication channel established from a destination node detecting a failed transmission path to a source node to transmit a failed path notification, wherein a route established by the destination-to-source communication channel traversing one or more of the optical network nodes defines an alternate transmission

path based on available capacity to allow information from the failed transmission path to be rerouted, and wherein the fiber cross-connect and optical cross-connect circuits of the network nodes defining the alternate transmission path are switched in response to the failed path notification to facilitate source-to-destination transmission of the optical signals from the failed transmission path along the alternate path.

Claim 33, upon which claim 35 depends, is directed to a method including establishing a protection path for a failed optical link between a source node and a destination node in an optical wave division multiplexing mesh network, wherein a transfer of optical signals from the source node to the destination node is suspended by the failed optical link. The method also includes detecting the failed optical link at the destination node by recognizing the loss of optical power at destination node cross-connect ports. The method further includes transmitting a link failure signal via a communication channel from the destination node detecting the failed link to the source node through at least one alternate nodes node. The method additionally includes determining whether a node of the at least one alternate node has available capacity to allow transmission of the suspended optical signals to be rerouted. The method also includes configuring a cross-connect switch at each of the alternate nodes receiving the link failure signal. The method further includes cross-connecting input ports to output ports of the cross-connect switch such that a source-to-destination protection path for transmission of the suspended optical signals is established as the link failure signal is transmitted from the destination node to the source node. The method additionally

includes switching the suspended optical signals from the failed optical link to the source-to-destination protection path upon receipt of the link failure signal at the source node, whereby the source-to-destination protection path is set up using a destination-to-source communication channel.

It is respectfully submitted that the cited references, Azuma, Badt, and Crawley, whether viewed singly or combined, do not disclose or suggest all of the elements of any of the presently pending claims.

The references are discussed above. The Office Action again failed to provide a reason to combine the specific desired features of Crawley with either Badt or Azuma. Badt, Crawley, and Azuma each discuss establishing a new network connection, but each has a different, inconsistent approach. Applicant respectfully submits that it would not have been obvious to one of ordinary skill in the art to combine Badt, Crawley, and Azuma, because a practical combination would be unworkable, and Applicants respectfully submit that there is no particular teaching, motivation, or suggestion to modify Badt by extracting isolated aspects of Crawley and Azuma in order to provide a method that would be within the scope of the present claims.

The Office Action responded that the references are “from the same field of endeavor” and that Azuma and Crawley supply features that Badt is missing in order for Badt to “perform all the function [sic] of the present claims.” Applicant respectfully disagrees with the Office Action’s analysis.

The mere fact that references are from “the same field of endeavor” is not, by itself, sufficient to motivate the combination of particular teachings of the references. Moreover, as explained in MPEP 2141.01(a)(V), when the technical solutions are radically different and inconsistent as they were in *Wang Laboratories, Inc. v. Toshiba Corp.*, 993 F.2d 858, 26 USPQ2d 1767 (Fed. Cir. 1993), the references cannot fairly be said to be in the “same field of endeavor.” Here, the approaches of the various references are incompatible and inconsistent and therefore cannot be said to be from the same field of endeavor.

Moreover, the Office Action’s comment regarding the absence of certain teachings from Badt and the necessity of supplying secondary references to remedy those deficiencies in order to teach what is claimed is clear illustration of improper hindsight combination, not of a proper motivation to combine. Accordingly, Applicant respectfully requests that the rejection be withdrawn.

Conclusion

For the reasons explained above, it is respectfully submitted that each of claims 1-38 recites a combination of subject matter that is neither disclosed nor suggested in the cited art. It is, therefore, respectfully requested that all of claims 1-38 be allowed, and that this application be passed to issue.

If – for any reason – the Examiner determines that the application is not now in condition for allowance, it is respectfully requested that the Examiner contact, by

telephone, Applicant's undersigned attorney at the indicated telephone number to arrange for an interview to expedite the disposition of this application.

In the event this paper is not being timely filed, Applicant respectfully petitions for an appropriate extension of time. Any fees for such an extension together with any additional fees may be charged to Counsel's Deposit Account 50-2222.

Respectfully submitted,

A handwritten signature in cursive script, reading "Peter Flanagan", written over a horizontal line.

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